Mohd Azman Zuwairi bin Ghazali v Public Prosecutor

A

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO K-05–420 OF 2010
ABU SAMAH, ABDUL WAHAB PATAIL AND MOHTARUDIN BAKI JJCA
21 DECEMBER 2012

B

Criminal Procedure — Appeal — Evidence — Drug trafficking — Conviction and sentence — Whether sale and purchase transaction of drugs took place when delivery and payment made — Dangerous Drugs Act 1952 s 39B(1)(a) &(2) — Penal Code s 34

C

D

Evidence — Agent provocateur — Admissibility of evidence — No mention of agent provocateur in police report — Whether conversations on telephone prior to arrest, proven — Whether police report expected to state entire factual narrative of offence — Admissibility of evidence of agent provocateur — Dangerous Drugs Act 1952 s 40

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Upon receiving information that a drug trafficking activity would take place, SP6, via the aid of an informant, passed a telephone number belonging to SP4, to the trafficker. Three days later, SP4 received a telephone call from one 'Abang' ('the appellant'), stating that he was a ganja supplier and if SP4 was to call him back if interested. SP4 called the appellant to arrange for a meeting. It was agreed that SP4 would meet the appellant at a market where the latter sold chicken. At the market, it was agreed that the transaction of the sale and purchase would take place at one petrol station. On the day of the transaction, an ambush plan was laid. Upon arrival at the promised place, the appellant opened the front passenger door and showed the ganja to SP4 ('P11'). Suspecting P11 to contain ganja, SP4 signaled the ambush party. The appellant and the second accused was arrested and subjected to a body search but no incriminating items were found. The appellant was convicted and sentenced for trafficking in drugs, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') read together with s 34 of the Penal Code and punishable under s 39B(2) of the DDA. In the present appeal, it was contended, inter alia, that the police report made no mention of an agent provocateur and therefore, the prosecution had failed to prove the conversations on the telephone and that there was no sale of drugs between SP4 and the appellant.

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Held, dismissing the appeal and affirming the conviction and sentence of court below:

(1) A police report is not expected to state the entire factual narrative of an

offence. It is the facts as to his actions, as proved by the evidence that determines whether he was an agent provocateur and not whether he was reported and investigated as such. The evidence of an agent provocateur is admissible under s 40A of the DDA. Hence, the testimony of SP4 in respect of the telephone conversations with the appellant was admissible (see para 26).

(2) The event had progressed well beyond offering to sell or offering or negotiating a sale, agreeing to sell, or the making of an agreement to sell. They were at the place where the actual sale, the delivery and payment was to take place. When the facts were taken as a whole, the appellant was for all intents and purpose at that moment in the act of selling, completion of which was interrupted by the ambush (see para 28).

[Bahasa Malaysia summary

Selepas menerima maklumat bahawa aktiviti mengedar dadah akan berlaku, SP6, melalui bantuan pemberi maklumat, memberikan nombor telefon SP4, kepada pengedar. Tiga hari kemudian, SP4 menerima panggilan telefon daripada seorang 'Abang' ('perayu'), menyatakan bahawa dia adalah pembekal dan jika SP4 berminat untuk memanggil dia semula. SP4 memanggil perayu untuk mengatur perjumpaan. Adalah dipersetujui bahawa SP4 akan bertemu dengan perayu di pasar di mana perayu menjual ayam. Di pasar, adalah dipersetujui bahawa transaksi jual dan beli akan mengambil tempat di suatu stesen minyak. Pada hari transaksi, pelan serbuan telah dibuat. Setelah tiba di tempat yang dijanjikan, perayu membuka pintu penumpang bahagian hadapan dan menunjukkan ganja tersebut kepada SP4 ('P11'). Mengesyaki P11 mengandungi ganja, SP4 memberi isyarat kepada pasukan serbuan tersebut. Perayu dan tertuduh kedua ditangkap dan disubjekkan kepada carian badan tetapi tiada barang-barang salah ditemui. Perayu disabitkan dan dihukum untuk pengedaran dadah, kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') dibaca bersama dengan s 34 Kanun Keseksaan dan boleh dihukum di bawah 39B(2) ADB. Dalam rayuan ini, ia dihujahkan, antara lain, bahawa laporan polis tidak menyatakan mengenai ejen perangkap dan oleh itu, pihak pendakwaan telah gagal untuk membuktikan perbualan di telefon dan bahawa tidak terdapat jualan dadah di antara SP4 dan perayu.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman Mahkamah Tinggi:

(1) Laporan polis adalah tidak dijangka untuk menyatakan keseluruhan fakta naratif sesuatu kesalahan. Ia adalah fakta terhadap tindakannya, seperti yang dibuktikan oleh keterangan yang menentukan sama ada dia adalah ejen perangkap dan bukan sama ada dia dilaporkan atau disiasat sebagai sedemikian. Keterangan ejen perangkap boleh diterima pakai di bawah s 40A ADB. Maka, keterangan SP4 berkaitan perbualan telefon dengan perayu boleh diterima pakai (lihat perenggan 26).

(2) Kejadian tersebut telah berlanjutan sehingga melampaui tawaran untuk menjual atau tawaran atau perundingan jualan, persetujuan untuk menjual, atau membuat perjanjian untuk menjual. Mereka berada di tempat di mana jualan sebenar, penghantaran dan bayaran akan mengambil tempat. Apabila fakta diambil kira dengan keseluruhannya, perayu adalah untuk kesemua niat dan tujuan pada masa tersebut dalam perbuatan menjual, penyelesaian yang mana diganggu oleh serbuan tersebut (lihat perenggan 28).]

Notes

For cases on admissibility of evidence, see 7(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 351–352.

For cases on evidence, see 5(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 430–477.

Cases referred to

Chan Pean Leon v PP [1956] MLJ 237 (refd)

Choo Yoke Choy v PP [1992] 2 MLJ 632, SC (refd)

Ghazalee bin Kassim & Ors v PP [2009] MLJU 402; [2009] 4 CLJ 737, FC (refd)

Kesavan a/l Petchayo @ Balakrishnan v PP [2003] 2 MLJ 209; [2003] 1 CLJ 846, CA (refd)

Looi Kow Chai & Anor v PP [2003] 2 MLJ 65; [2003] 1 CLJ 734, CA (refd)

Mah Hong Ching & Anor v PP [2007] 1 MLJ 123; [2007] 2 CLJ 292, CA (refd)

Munusamy v PP [1987] 1 MLJ 492; [1987] 1 CLJ 250, SC (refd)

Nasarudin Daud v PP & satu lagi [2011] 3 CLJ 713, FC (refd)

PP v Badrulsham bin Baharom [1988] 2 MLJ 585 (refd)

PP v Chia Leong Foo [2000] 6 MLJ 705; [2000] 4 CLJ 649, HC (refd)

PP v Datuk Hj Harun bin Haji Idris (No 2) [1977] 1 MLJ 15 (refd)

PP v Hoo Chee Keong [1997] 4 MLJ 451, HC (refd)

PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC (refd)

PP v Salleh bin Zakaria & Anor [2010] 4 MLJ 25, CA (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 39B(1)(a), (2), 40A

Evidence Act 1950 ss 90A, 114(g)

Appeal from: Criminal Trial No 45–11 of 2006 (High Court, Alor Setar)

G Ravishankar (R Shankar Gandhi & Associates) for the appellant.

Munahyza bt Mustafa (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Abdul Wahab Patail JCA (delivering judgment of the court):

[1] The appellant first accused Mohd Azman Zuwairi bin Ghazali ('the appellant') was charged, tried, convicted and sentenced upon a charge that:

> Bahawa kamu bersama-sama pada 29 hb. Mac 2005, jam lebih kurang 12:10 tengah malam di kawasan Stesyen Minyak ESSO Laguna Merbok, Jalan Besar, Sungai Petani, di dalam Daerah Kuala Muda, dalam Negeri Kedah Darul Aman, dalam meneruskan niat bersama kamu, telah mengedar dadah berbahaya iaitu cannabis seberat 5,241.3 gram. Oleh yang demikian kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dibaca bersama seksyen 34 Kanun Keseksaan dan boleh dihukum di bawah seksyen 39B(2) Akta Dadah Berbahaya 1952.

THE APPEAL

[2] The appeal before us was presented under the following headings:

(a) SP4 was not an agent provocateur;

(b) credibility of prosecution witnesses;

(c) identity of the exhibits; and

(d) misdirection.

[3] The appeal grounds pertain to matters within the prosecution case. We set out as background the prosecution case and the findings at the end of the prosecution case.

THE PROSECUTION CASE

[4] The events constituting the core of the prosecution case against the appellant unfolded as follows.

[5] On 24 March 2005, Chief Inspektor Ismail bin Daud ('SP6') received information that there was a Malay male trafficking in the dangerous drug *ganja* in Gurun and Merbok, Kedah. SP6 gave to the informant the telephone No 0134081887 to give to the Malay male. It was the telephone number of his subordinate Lans Kopral Azib bin Mahamud ('SP4'). SP6 informed SP4 he had done so. Three days later, in the morning of 27 March 2005, SP4 received a telephone call from a No 0124368045. The caller introduced himself as 'Abang', that he supplied *ganja* and if SP4 was interested, to call him back. He offered a special price, but required a meeting beforehand. SP4 agreed to meet the next day. SP4 informed SP6.

[6] The next day, 28 March 2005 at about 12.15pm, SP4 called 'Abang' on 0124368045 to arrange to meet. 'Abang' told SP4 to go to the *Pasar Malam* Gurun between 8–10pm as 'Abang' sold chicken there. SP4 conveyed this information to SP6.

[7] The same day at about 5.30pm, SP6 directed SP4 and another police officer Det Kpl Ahmad Sidi ('Ahmad Sidi') to act as agent provocateurs, and that upon SP4 seeing the supply of ganja he was to give a signal by taking off his hat. SP6 also supplied SP4 with RM20,000 as 'wang tunjuk' to satisfy the supplier if he requested to see if SP4 had the money.

[8] At about 7.10pm, SP4 had confirmed with 'Abang' about meeting at the *Pasar Malam* Gurun, and informed SP6. SP4 and Ahmad Sidi were directed to proceed to Gurun. Thereafter an ambush was mounted with 15 men, including ASP Muharishanizam bin Abas ('SP7'). They arrived at the *Pasar Malam* Gurun at about 7.45pm. SP4 and Ahmad Sidi arrived at about 9pm and called 'Abang' who told him to proceed to where he was selling chicken.

[9] Arriving at the chicken *gerai*, SP4 and Ahmad Sidi met a Malay man there and asked for 'Abang'. The Malay man, identified as the appellant, replied he was 'Abang'. They shook hands. The owner of the *gerai*, Betty Falhana bt Ahmad ('SP5') noticed their meeting. SP5 was asked for permission by the appellant to meet with SP4 and Ahmad Sidi at the back of the *gerai*. The appellant asked for RM2,200 per kilogram, and said he had 6kg. They agreed to transact the sale and purchase at the Laguna Merbok Esso Petrol Station near the Sungai Lalang Toll.

[10] Leaving the gerai with Ahmad Sidi, SP4 called SP6. He informed SP6 the Malay man in the chicken gerai was 'Abang' and the sale and purchase transaction would be carried out at the Laguna Merbok Esso station after 'Abang' finished work at the chicken gerai that night. SP4 and Ahmad Sidi were told to go to the said petrol station and to inform 'Abang' when they had arrived there.

[11] At about 11pm on 28 March 2005, SP6 and his men arrived at the petrol station and took up their positions. SP4 and Ahmad Sidi arrived at about 11.30pm and called the appellant. He was told to wait.

[12] At about 11.55pm, SP4 received a call from the appellant who told him he had arrived and was in a Kancil No KAV 7693 with a friend. SP4 confirmed he had brought sufficient money and was asked to go to the car beside the Sungai Petani — Alor Setar road. SP4 informed SP6. SP6 saw SP4 and Ahmad Sidi proceed to a Kancil car where two men were standing outside the front passenger door. SP7 who had earlier seen the Kancil KAV 7693 arrive and stop

by the roadside saw the passenger (the second accused) come out and later the driver (the appellant). SP7 then saw SP4 and Ahmad Sidi come to the car and met the appellant and the second accused.

[13] They shook hands when they met and on confirmation that SP4 had brought the money, the appellant opened the front passenger door and said the *ganja* were in the red paper bag ('P11'). Looking into P11, SP4 saw some compressed slabs which he suspected to contain *ganja*. SP4 straightened up and gave the signal by taking off his hat. The ambush began with a shout 'Police'. The appellant was able to run away for about 50 meters before SP7 and three other officers managed to catch him. The second accused managed to run 15–20 meters before he was caught by five other officers. When the first and the second accused were being chased, the car was guarded by SP6 and another officer named Muslim.

[14] After they were caught, the appellant and the second accused were brought before SP6 who introduced himself as police. A body search on the appellant and the second accused found no prohibited items. SP6, observed by SP7 looked inside the Kancil KAV 7693, found P11 in the front passenger footwell. It had the word 'Pacific' printed on it. Inside P11, he found six compressed slabs of dried vegetative matter suspected to be *ganja* (the *barang kes*). Four of the compressed slabs were packed in tin foil and transparent plastic, while the other two in transparent plastic only. Further search of the car turned up no more prohibited items.

[15] The appellant and the second accused were brought together with the barang kes to the Bilik Gerakan IPD Kuala Muda, guarded by SP7 and other officers.

[16] The *barang kes* were brought to the Government Chemist Kamarulzaman Mustafa ('SP3') by the investigating officer Chief Inspektor Mulkiaman bin Munzar ('SP8'). SP3 found upon analysis that the *barang kes* contained a total of 5,251.3g of the dangerous drug cannabis. The chemist's report was produced and exhibited as P10.

AT END OF PROSECUTION CASE

[17] At the end of the prosecution case, the learned judicial commissioner of the High Court, having directed himself in accordance with *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65; [2003] 1 CLJ 734) and *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457 conducted a maximum evaluation of the evidence before him. He examined the evidence of SP4. He found the evidence of SP4 corroborated in material particulars by SP6, SP5 and SP7. The learned judicial commissioner addressed

the inconsistencies that emerged in the testimony of SP4, such as the distance between the table where chicken was sold and where the appellant and SP4 and Ahmad Sidi were speaking, and the distance between the chicken *gerai* and the Laguna Merbok Esso Petrol Station. These inconsistencies are hardly relevant to the facts constituting the offence as charged. They pertain to the reliability of the testimony of SP4. It was not the evidence of SP4 that he measured these distances, where differences would throw doubt over the measurement or even if he did make the measurement. But these are obviously estimates. Having directed himself on *Public Prosecutor v Datuk Hj Harun bin Haji Idris (No 2)* [1977] 1 MLJ 15 (FC), the learned judicial commissioner held that the differences were minor and immaterial. Similarly, he accepted the testimony of SP6 also.

[18] The learned judicial commissioner examined the testimony of SP5 who was the owner of the chicken *gerai* and the Kancil car KAV 7693. He addressed his mind to the challenge put in cross-examination that she was the owner of the red paper bag P11 with the *barang kes*. He accepted her answer.

[19] The learned judicial commissioner addressed the question of knowledge, and guided himself with the decisions in *Chan Pean Leon v Public Prosecutor* [1956] MLJ 237 and *Choo Yoke Choy v Public Prosecutor* [1992] 2 MLJ 632 and proof thereof (*Public Prosecutor v Salleh bin Zakaria & Anor* [2010] 4 MLJ 25. *Public Prosecutor v Badrulsham bin Baharom* [1988] 2 MLJ 585 and *Public Prosecutor v Hoo Chee Keong* [1997] 4 MLJ 451). He took into consideration and drew inference from the surrounding circumstances (*Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705; [2000] 4 CLJ 649). Then only he came to the conclusion that the prosecution had proved a prima facie case:

> Oleh itu saya dapati keterangan yang dikemukakan oleh pihak pendakwa mencukupi untuk membuktikan kes prima facie terhadap pertuduhan mengedar dadah dan kedua-dua tertuduh-tertuduh perlu membela diri terhadap pertuduhan tersebut.

SP4 WAS NOT AN AGENT PROVOCATEUR

[20] The first and third submissions concern the police report where no mention of an agent provocateur was made. SP8 testified that as a result he did not investigate concerning the agent provocateur, because the police report prepared by SP6 did not mention an agent provocateur. SP8 agreed he did not investigate the agent provocateur.

[21] It was submitted that SP8, therefore, did not know the numbers of the telephones used, the prosecution had failed to prove the conversations on the

telephone and the learned judicial commissioner had failed to consider the failure of the prosecution to prove the conversations between SP4 and the appellant.

[22] With respect, we see no necessity to investigate an agent provocateur. Indeed, the question does not arise because he is called as a witness as SP4, and was cross-examined. In *Kesavan a/l Petchayo Balakrishnan v Public Prosecutor* [2003] 2 MLJ 209; [2003] 1 CLJ 846 (CA), it was held that the:

> arresting officer should have made a contemporaneous note of the statement in his investigation diary or in his police report, which could then be used by him to refresh his memory under s 159 of the Evidence Act 1950. This would have been of considerable evidential value to satisfy the court that his recollection of the events was accurate. It was, therefore, in the circumstances, incumbent upon the trial judge to have approached the statement with utmost caution.

[23] In this case, both SP4 and SP6 were called as witnesses and were available for cross-examination, to demonstrate, if possible, where and how their testimony were unreliable.

[24] We observe that although this issue was addressed in the submissions at the end of the prosecution case, the notes of proceedings show that it was put to SP4:

> Q: Saya cadangkan, no telefon OKT 1 bukan lah 012-4368045?
>
> A: Tidak setuju.

[25] Upon the answer 'Tidak setuju', there was no follow up. SP4 had earlier, in his cross-examination, stated that he recorded his movements and activities in his pocket book, and to the question whether he could tell him where his pocketbook was, SP4 said it was with him. He had said he had recorded that number in his pocketbook. SP4, in cross-examination, had also told counsel there was nothing wrong in counsel having a look at his pocketbook. But at no point did counsel ask SP4 to produce his pocketbook to settle the question. The testimony of SP4 on this point, therefore, was not successfully challenged and stands. Subject to the ground of appeal on credibility of SP4, the prosecution had successfully proved prima facie the conversations by the agent provocateur with the appellant and that the appellant's telephone number was 0124368045.

[26] We observe that a police report is not expected to state the entire factual narrative of an offence. Its purpose is to record a report of a possible crime to justify commencement of investigations. While mention of a fact in the police report may add weight and substance to the testimony of a witness as to that

fact, the absence does not prove the fact did not exist, or should it diminish the testimony of the witness who appears before the court to be examined and cross-examined. It is the facts as to his actions, as proved by the evidence, that determines whether he is an agent provocateur. Not whether he is reported and investigated as such. Therefore that no mention of an agent provocateur was made in the police report does not preclude evidence being adduced of the evidence of an agent provocateur. The evidence of an agent provocateur is admissible under s 40A of the Dangerous Drugs Act 1952 ('Act 234'). Hence, the testimony of SP4 in respect of the telephone conversations with the appellant was admissible. Whether the prosecution succeeded in proving the conversations depends upon the credibility of SP4. We address that question further below. In the event the credibility of SP4 stands scrutiny, there is no requirement that the evidence of an agent provocateur must be corroborated.

[27] The second submission is that there was no sale. The basis of the submission is that the purchase price money of RM13,200 was not shown to the appellant by SP4. Counsel relied upon *Mah Hong Ching & Anor v Public Prosecutor* [2007] 1 MLJ 123; [2007] 2 CLJ 292 (CA). In our view, the said authority is of little assistance for the submission (see *Nasarudin Daud v Public Prosecutor & satu lagi* [2011] 3 CLJ 713 (FC)). The said authority established that the term 'selling', in the definition of trafficking in s 2 of Act 234 must be given the restricted interpretation of selling which does not include offering, agreeing or negotiating to sell or for a sale. In other words, it is confined to an actual act of selling.

[28] The evidence, in this case, shows that the event by the roadside at the Laguna Merbok Esso Petrol Station had progressed well beyond offering to sell or offering or negotiating a sale, agreeing to sell, or the making of an agreement to sell. They were at the place where the actual sale, the delivery and payment was to take place. The appellant accepted SP4's answer that SP4 had the money in his bag and the appellant opened the door of the car to show SP4 that he had the ganja for sale. When the facts are taken as a whole, the appellant was for all intents and purpose at that moment in the act of selling, completion of which was interrupted by the ambush.

CREDIBILITY OF PROSECUTION WITNESSES

[29] It was submitted that SP4 was not credible. SP4 had said, in cross-examination, he did not know the distance between the *Pasar Malam* Gurun and the Laguna Merbok Esso Petrol Station because he rarely passed there. It was submitted:

> Ini tidak mungkin benar kerana SP4 adalah seorang anggota polis di IPK Kedah, di bahagian risikan.

[30] Our examination of this part of the cross-examination shows that counsel had accepted the answer and had not put to SP4 that his answer that he rarely passed that area could not be believed. In the circumstances, it is unsafe to conclude his answer could not be believed. Further, the fact SP4 replied he was not sure how long he took to drive from the *Pasar Malam* Gurun to the Laguna Merbok Esso Petrol Station does not support the submission that 'Ini menunjukkan bahawa tidak mungkin SP4 telah pergi ke stesyen minyak ESSO di Laguna Merbok dari pasar malam Gurun'. Similarly, the question had not been put to him.

[31] There was a difference between the testimony of SP4 and SP5 as to the distance between where SP4 and the appellant were speaking behind the chicken *gerai*. SP4 said it was about two meters, while SP5 said it was 30–35 meters. However, SP4 was speaking about the distance between where they were speaking behind the table where the chicken was sold (see RR67) and where the two women were at the chicken table, and this was clarified in a later question. SP5 was not speaking of a discussion behind the chicken table but the chicken *gerai*. It was not submitted to us, but from the notes of proceedings, we found:

(a) SP6 had testified to seeing SP4 and Ahmad Sidi from 20 feet away:

> A: Pada jam lebih kurang 9.00 malam, 28/3/2005 saya nampak DLkpl Azib dan Ahmad Sidi sampai di kawasan pasar malam. Saya terus membuat pemerhatian dan pemantauan ke atas kedua-dua anggota ini dan dalam pemantauan saya, saya dapati Azib dan Mt Sidi telah menuju ke satu meja ayam di kawasan pasar malam tersebut. Saya nampak Azib berbual dengan satu lelaki melayu yang meniaga ayam di meja tersebut. Tidak lama kemudian, Azib bersama lelaki penjual ayam tersebut mengadakan perbincangan di belakang meja tempat dia meniaga. Saya nampak Azib dan Ahmad Sidi beredar meninggalkan meja ayam tersebut dan lelaki tersebut meneruskan perniagaannya.

(b) SP7 clarified they were not behind the chicken *gerai* but at the back of it:

> Q: Kamu kata kamu nampak Azib dan Mat Sedi jumpa dengan OKT 1. Kemudian apa lagi kamu nampak?
>
> A: Mereka berbual-bual seketika di belakang gerai tersebut.
>
> Q: Apa yang kamu maksudkan di belakang gerai?
>
> A: Di bahagian belakang gerai.
>
> …
>
> Q: Apa lagi yang berlaku?
>
> A: Selepas berbual dengan OKT 1, kedua-dua Under Cover telah kembali ke kenderaan mereka.

[32] From the foregoing, it follows it is not the credibility of SP4 or SP6 that is affected but that of SP5. A

[33] It was submitted the adverse presumption under s 114(g) of the Evidence Act 1950 was applicable because Det Kpl Ahmad Sidi, said to have been appointed by SP6 to assist SP4, was not called to give evidence. Section 114(g) gives the court discretion to draw an adverse inference. It has been explained in *Ghazalee bin Kassim & Ors v Public Prosecutor* [2009] MLJU 402; [2009] 4 CLJ 737 (FC) that court will only invoke s 114(g) of the Evidence Act 1950 for failure to call a witness if it is of the opinion that the prosecution does so to withhold or suppress evidence which, if produced, could be construed against the prosecution or otherwise in favour of the accused. It had also been explained in *Munusamy v Public Prosecutor* [1987] 1 MLJ 492; [1987] 1 CLJ 250 that: B C

> It is essential to appreciate the scope of s 114(g) lest it be carried too far outside its limit. Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document, but material document by a party in his possession, or for non-production of not just any witness but an important and material witness to the case. D E

[34] There is nothing established or put in cross-examination that the evidence of Det Kpl Ahmad Sidi was being suppressed. At the time other witnesses were offered, the issue of Det Kpl Ahmad Sidi not being offered could have been raised but was not. The appellant did not require the offered police witnesses. With nothing on record, it is unsafe to make any conclusion, including that his testimony was being suppressed. In our view, the there was no reason to invoke s 114(g). F

[35] It was submitted the testimony of SP6 was unreliable. The learned judicial commissioner had said at RR204 that: G

> Mahkamah: Terdapat percanggahan material di dalam keterangan SP6 di dalam perbicaraan sekarang dan keterangan dalam perbicaraan terdahulu. Saksi hendaklah beri penjelasan kenapa berlaku percanggahan tersebut H

[36] From the record of proceedings, there was explanation given immediately after. At RR205, it was explained that he was guided on the basis where he had signed, but that he had erred on the handwriting: I

> A: Tulisan seakan-akan tulisan saya.

[37] All it meant was that his testimony ought to be taken with some caution

but it does not mean that his testimony on other parts must be rejected.

IDENTITY OF THE EXHIBITS

[38] It was submitted that there were discrepancies in the description of the *barang kes*:

> Ekshibit P14: (6) ketulan mampat daun kering disyaki ganja berbalut dengan plastik lutsinar setiap satu.
>
> Ekshibit P15: (6) ketulan mampat berbalut plastik lutsinar setiap satu disyaki ganja
>
> Chemist Report P10:
>
> > Empat (4) bungkusan plastik yang dibalut dengan kerajang aluminium.
> >
> > Dua (2) bungkusan plastik (tanpa kerajang aluminium).

[39] It was submitted that these differences were not explained. We found, however, that SP6 had given evidence-in-chief as follows:

> Q: Bagaimana keadaan 6 ketulan mampat?
>
> A: Berbalut dengan plastic lutsinar. 4 daripadanya terdapat kertas kerajang timah manakala 2 ketulan lagi tiada kertas timah.

[40] Likewise, SP8 had testified:

> Q: Apa barang kes yang kamu terima dari pengadu dalam kes ini?
>
> A: 1 beg kertas merah bertulis PACIFIC yang telah ditanda 'A' dan terdapat tandatangan pengadu serta tarikh 29/3/2005.
>
> 6 ketulan mampat tumbuhan kering disyaki ganja di mana 4 ketulan tersebut berbalut kertas timah dan plastic cerah manakala 2 ketulan lagi berbalut plastic cerah yang ditanda A1, A2, A3, A4, A5 & A6 oleh pengadu.

[41] We take judicial notice that these terms used at the trial were not challenged because the particular material is both commonly known as aluminium foil or tin foil.

[42] We found that the cross-examination of SP8 accepted that of the six slabs, four slabs were wrapped in tin foil where he did not know the contents. He maintained, under cross-examination, the six slabs he sent to the Chemistry Department were the same as those he had received. The *barang kes* had been marked.

[43] It was submitted that the receipt P9 from the Chemistry Department was not admissible under s 90A of the Evidence Act 1950. We find it unnecessary to address this question as the purpose of producing it was to corroborate evidence of handing over. Since there is the evidence of the person handing over the *barang kes*, the receipt is not material.

MISDIRECTION

[44] The learned judicial commissioner had found:

> Keterangan SP4 tidak mengatakan beliau nampak tertuduh kedua datang ketempat itu bersama-sama tertuduh kedua.

[45] It was submitted this contradicted:

(a) SP7 who testified both the appellant and the second accused arrived together in the Kancil car KAV 7693; and

(b) his own finding:

> Pada masa kedua-dua tertuduh ditangkap mereka berdua sahaja berada dalam motokar.

[46] It was submitted the following was a misdirection:

> kehadiran tertuduh kedua bersama disitu dan diperkenalkan sebagai kawan oleh tertuduh pertama yang sebelum itu mengatakan telah datang dengan kawan menimbulkan inferens bahawa terdapat perancangan terdahulu diantara mereka untuk melakukan kesalahan mengedar dadah dan kesalahan tersebut dilakukan sebagai melaksanakan perancangan terdahulu itu.

[47] This part of the submission merely expresses a dissatisfaction with the fact that the appellant was convicted but the second accused was acquitted. The latter is not before the court. In any case, the jurisdiction of the court is in respect of the parties before it.

CONCLUSION

[48] For the foregoing reasons, we found no appealable errors. Accordingly, we affirmed the conviction and sentence by the High Court and dismiss the appeal.

Appeal dismissed and conviction and sentence of court below affirmed.

Reported by Afiq Mohamad Noor